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No. 08-1

Supreme Court, U.S.
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In The

Supreme Court of the United States

PRINCE SOLOMON KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner faced a four-count indictment and trial in the Northern District of Illinois. One of the counts pled that the offense occurred in Abidjan, Ivory Coast, and nowhere else. A second alleged that the offense occurred in both the Eastern District of Missouri and the Northern District of Illinois. Evidence on that offense, a false statement contrary to 18 U.S.C. § 1001(a)(2), suggested that Petitioner spoke by telephone from the Eastern District of Missouri to a government agent in the Northern District of Illinois.

Petitioner's trial lawyer never objected to venue. The lawyer summarily moved for acquittal at the close of the prosecution's case-in-chief and again at the close of all evidence under FED. R. CRIM. P. 29, but omitted any mention of venue. On appeal, the United States Court of Appeals held venue objections waived, not just forfeited, and therefore not reviewable.

1. By mere failure to object to venue, may a party enlarge the jurisdiction that the United States Constitution gives federal courts under Article III, § 2, and permit a prosecution otherwise outside the territorial and statutory jurisdiction of a United States court?

2. Where the accused is silent and uninformed, does a lawyer's mere failure to object to improper venue effect an adequate waiver of a criminal defendant's Sixth Amendment constitutional right to face prosecution in the correct venue, under this Court's waiver decisions dating back at least to *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Prince Solomon Knox respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A to this Petition and is published at 540 F.3d 708. The indictment is Appendix B.

Neither Petitioner nor Respondent asked the district court to consider the issues presented here, so there is no district court ruling on them.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit decided Petitioner's case on September 2, 2008. Neither party filed a petition for rehearing in the court of appeals. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Art. III, § 2 provides in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. Amend. VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . .

STATUTES INVOLVED

18 U.S.C. § 3238 provides in relevant part:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one or two or more joint offenders, is arrested or is first brought; . . .

18 U.S.C. § 3237(a) provides in relevant part:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

* * *

STATEMENT OF THE CASE

Petitioner was the sole defendant in a four-count indictment that a federal grand jury handed up in the Northern District of Illinois (R1) (App. B). At that time, Petitioner lived in St. Louis, Missouri, within the Eastern District of Missouri (R89:447). The government arrested him in the Eastern District of Missouri (R5; R89:416-17) and later removed him to the Northern District of Illinois for trial (R5). Petitioner is a citizen of Sierra Leone who entered the United States under an asylum program for refugees from civil war in Liberia and their families (R89:96, 101).

The first three counts of the indictment concerned Petitioner's actions in winning admission to the United States under that asylum program. Counts One and Two alleged that Petitioner falsely subscribed statements on United States immigration forms while in Abidjan, Ivory Coast. Both counts

contended specifically that, "On or about December 9, 2003, in Abidjan, Ivory Coast," Petitioner knowingly subscribed under penalty of perjury a material false statement on forms that American immigration laws and regulations required (R1:Counts One and Two) (App. B at 1-4). Count One also alleged that Petitioner later presented the false form "to federal authorities in Chicago, Illinois, upon entry into the United States" (R1:Count One) (App. B at 29). Count Two included no allegation that Petitioner presented the false statement within the territory of the United States (R1:Count Two) (App. B at 30-31). Count Three alleged materially false sworn oral statements to an "INS officer," again "[o]n or about December 9, 2003, in Abidjan, Ivory Coast" (R1:Count Three) (App. B at 31-32).

Count Four differed. That charge alleged a false statement in violation of 18 U.S.C. § 1001(a)(2) while Petitioner was in the United States. This count charged that, "On or about March 29, 2006, in the Eastern District of Missouri and Northern District of Illinois," Petitioner willfully made material false statements on a matter within the jurisdiction of the Department of Homeland Security (R1:Count Four) (App. B at 32-33).

Although the indictment on its face suggested a lack of proper venue as to Count 3 at least, the defense did not raise a venue challenge before trial.

Petitioner took his case to a jury. The evidence at trial as to venue on the first three counts was consistent with the indictment. As to Count 4, the evidence showed that Petitioner made the false statement over the telephone (R89:409-13). Viewed in the light most favorable to the government, Petitioner was in the Eastern District of Missouri and the Department of Homeland Security agent with whom he spoke was in Chicago, in the Northern District of Illinois (R89:409-10, 418).

At the close of the government's case-in-chief and again at the close of all evidence, Petitioner's lawyer moved summarily for judgment of acquittal under FED. R. CRIM. P. 29 (R89:421, 588). Counsel made no specific argument and never mentioned venue. Petitioner himself did not comment. The district court quickly denied both motions for acquittal, also without mention of venue (R89:421, 588). The jury convicted on all four counts.

On appeal to the United States Court of Appeals for the Seventh Circuit with a new lawyer, Petitioner argued that the government failed to prove venue on Counts 3 and 4. He acknowledged that he had forfeited his objection to venue, but argued expressly that he had not waived the argument under the standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938) (No. 07-2552, Appeal R. 11/13/07:29). Petitioner then contended that the absence of proper venue as to Counts 3 and 4, and the government's failure to prove venue on those counts, was plain error (Appeal R. 11/13/07:17-18, 28-37). He expressly relied in part on

both Article III, § 2 and the Sixth Amendment to the United States Constitution (Appeal R. 11/13/07:26, 31).

The court of appeals concluded that Petitioner's venue arguments were waived, not just forfeited by his failure to argue venue specifically before trial or in his motions for judgment of acquittal under Rule 29 (App. A at 9-10, 11-15). To reach that conclusion, the court of appeals necessarily overruled its own earlier decision in *United States v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949) (App. A at 14-15). The court of appeals also acknowledged a stark circuit split on the question whether a failure to object explicitly to improper venue or inadequate proof of venue in a Rule 29 motion constitutes a waiver or instead preserves the issue (App. A at 13-14, citing *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007); *United States v. Carbajal*, 290 F.3d 277, 289 n.19 (5th Cir. 2002); *United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984) (unspecific Rule 29 motion for acquittal waives venue); *United States v. Zidell*, 323 F.3d 412, 421 (6th Cir. 2003) (general Rule 29 motion preserved venue challenge)).

Because it found that Petitioner waived venue objections by his lawyer's failure to argue them, and that a bare Rule 29 motion is a waiver of a claim that the government failed to prove venue, the court of appeals held that it could not review venue on either Count 3 or Count 4 (App. A at 9-10, 15). It let stand convictions on those counts (and convictions on the other two counts as well) even though the conduct in

Count 3 occurred wholly outside the territorial jurisdiction of the United States and venue would have been proper, if at all, only in the Eastern District of Missouri. 18 U.S.C. § 3238. As to Count 4, if the government proved locale at all, Petitioner's conduct occurred in the Eastern District of Missouri, not in the district of prosecution. That conduct may have been outside the congressionally-established venue of a federal court in the Northern District of Illinois.

REASONS FOR GRANTING THE WRIT

I. Enlarging Venue: Article III Limitations.

The United States Constitution speaks twice to venue, in different ways. It includes both a limitation on federal power as to venue and an affirmative guaranty of individual right as to venue. Specifically, in Article III, the Constitution sets a limit on the power of the federal government to establish lower courts that may rule on controversies outside the place or places that Congress by law establishes. U.S. CONST. Art. III, § 2. In the Sixth Amendment, the Constitution assures the individual accused that he will face trial only in the state and district in which he committed his crime. U.S. CONST. Amend. VI. So there is both a sovereign limitation and an individual entitlement as to venue in federal courts under this country's founding document. The Sixth Amendment affords the individual accused an entitlement as to proper venue. But Article III imposes a structural

limitation on federal courts, quite apart from the individual litigants in those courts.

This Court never has held that the accused, or even litigants collectively, may relieve the federal government of limitations on its power that Article III imposes. To the contrary, an affirmative attempt to alter the structure that Article III imposes on federal courts, or to enlarge the jurisdiction of a federal court, by agreement or omission of the litigants invariably has failed. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (to the extent that the structural principle of preserving the constitutional system of checks and balances is affected, "the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2"); *Nguyen v. United States*, 539 U.S. 69, 80-81 (2003) (declining to apply plain error doctrine to appellate panel that did not include three Article III judges at the outset, even though petitioners never objected to composition of appellate panel until petition for certiorari in Supreme Court; "to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld. Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel"; italics in original);

Willy v. Coastal Corp., 503 U.S. 131, 135 (1992) ("federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute. . . . Such a caveat applies *a fortiori* to any effort to extend by rule the judicial power of the United States described in Article III of the Constitution"; therefore, Federal Rules of Civil Procedure apply on if their application will not impermissibly expand the judicial authority that Article III confers); see also *Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (only personal right to Article III adjudicator is at issue when magistrate judge conducts voir dire in criminal trial, so no Article III problem if defendant expressly consents; no structural aspects of Article III at stake there).

To Petitioner's eye, this Court not once has allowed a litigant's silence to expand the jurisdiction or other powers that the Constitution granted federal courts. The Court never has permitted litigants to expand a federal court's territorial reach by consenting to ignore or stretch the venue lines that Congress has drawn. In other words, the Court permits waiver, or consent to diminution, of personal rights under Article III, but not of that article's structural limitations on the powers of federal courts.

The Seventh Circuit's decision below now accomplishes that result. By virtue of the silence of Petitioner's lawyer, a federal court entered judgment on at least one crime (Count 3) that clearly occurred wholly outside the venue, as Congress established it, in which the government charged and tried the

accused. The crime occurred in no state, so at best the proper venue was the Eastern District of Missouri under congressional act. 18 U.S.C. § 3238. But the government filed and pursued the case in the Northern District of Illinois. The court of appeals' decision let that judgment stand.

This was even less than a stipulation of both parties that a federal court could enter judgment outside its constitutional bounds. It was an enlargement of Article III power by the mere silence, or waiver, of one party.

Petitioner agrees that he may waive the individual entitlement to proper venue that the Sixth Amendment gives him. The question is how. He addresses possible waiver in part II below. But he suggests that neither he nor any other litigant has the power, by waiver or consent, to relax or extend the sovereign limitations that Article III imposes. This Court should review the Seventh Circuit's judgment to determine whether it is consistent with this Court's decisions and indeed with the bounds of Article III power that, under this Court's consistent rulings, may not be enlarged by consent of litigants.

II. Is a Lawyer's Silence the Client's Waiver of Proper Venue?

A. Sixth Amendment Waivers Generally.

Subject to some conditions, this Court long has recognized the prerogative of individuals to waive

rights that the Bill of Rights affords them, including under the Sixth Amendment. See, e.g., *Faretta v. California*, 422 U.S. 806 (1975); *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (waiver of Sixth Amendment right to counsel). The accused even may waive some Sixth Amendment rights through counsel, rather than personally. In general, decisions about how to conduct a trial – which cross-examinations to forgo, which witnesses not to compel to attend, and which subpoenaed witnesses not to call in the end – all fall within counsel's control, even though they involve the client's constitutional rights. See *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988).

Some constitutional rights may be waived by counsel's, or the accused's, failure to object. See, e.g., *United States v. Gagnon*, 470 U.S. 522, 528 (1985) (failure to object waives right to be present during all critical stages of criminal trial, although the defendant himself must know of the event from which he absents himself, there an *in camera* conference with a juror); *Levine v. United States*, 362 U.S. 610, 619 (1960) (failure to object to closing courtroom waives right to public proceeding, although that case involved only the Fifth Amendment due process clause, not the Sixth Amendment right to a public trial, because it concerned contempt proceedings flowing directly from refusal to answer a grand jury's questions; see *Levine*, 362 U.S. at 616-17).

But other constitutional rights remain the client's alone to waive, knowingly and intelligently. The accused's rights to a jury trial and to maintain a not

guilty plea are his to waive personally; counsel may not waive them, at least in the face of the defendant's desire to the contrary. *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966). A guilty plea requires the accused's own express waiver of constitutional rights. *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). The accused personally must waive his right to counsel, or there is no waiver of that right. *Faretta v. California*, 422 U.S. 806, 834, 835 (1975). The accused makes the ultimate decision whether to pursue or waive an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); see also *Roe v. Flores-Ortega*, 528 U.S. 470, 478-79 (2000). Even when the defendant otherwise personally waives trial and pleads guilty, if he is unaware of one essential element of the offense and does not admit it, his plea – in effect a partial guilty plea – is not "voluntary in a constitutional sense." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). Counsel's assessment that the prosecution probably could prove the unacknowledged element does not save the plea. See *Henderson v. Morgan*, 426 U.S. at 650 (White, J., concurring).

In short, "What suffices for waiver depends on the nature of the right at issue. '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend upon the right at stake.'" *New York v. Hill*, 528 U.S. 110, 114 (2000), quoting *United States v. Olano*, 507 U.S. 725, 733 (1993). To date, only one member of this Court has expressed the certain view that, "as a constitutional

matter, all waivable rights (except, of course, the right to counsel) can be waived by counsel." *Gonzalez v. United States*, 128 S. Ct. 1765, 1774 (2008) (Scalia, J., concurring in the judgment). A second has entertained that possibility, but not committed. *Id.* at 1780-81 (Thomas, J., dissenting).

B. Counsel's Waiver of Venue by Silence: Inconsistency with Supreme Court Precedent.

At least arguably, in the absence of discussion with the accused, a lawyer's decision (or, worse and more likely, his default) that relieves the United States of the obligation both to prove proper venue when that is fairly in issue, and to prosecute a crime in the correct venue, does not effect a waiver of the constitutional right to proper venue. A rule finding waiver under those circumstances probably would not square with this Court's 2004 decision in *Florida v. Nixon*, 543 U.S. 175 (2004). At least as to "important decisions," *Nixon*, 543 U.S. at 187, a defense lawyer is obliged to explain proposed trial strategy to the defendant. *Nixon*, 543 U.S. at 189. A waiver by no more than counsel's unexplained silence certainly would not square with *Johnson v. Zerbst*, 304 U.S. 458 (1938).

On the facts in *Nixon*, which involved an unresponsive and uncooperative capital client who did not react one way or the other to counsel's thrice-proposed strategy of focusing on penalty phase

mitigation rather than challenging guilt, this Court declined to apply a "blanket rule demanding the defendant's explicit consent" to that strategic choice. *Nixon*, 543 U.S. at 192. This Court more recently has cited *Nixon* correctly for the proposition that "some basic trial choices are so important that an attorney must seek the client's consent in order to waive the right." *Gonzalez*, 128 S. Ct. at 1771.

Here, nothing in the records suggests that defense counsel had such a discussion with Petitioner about leaving improper venue uncontested. A timely challenge to venue presumably should have resulted in dismissal of those two counts. Even assuming some valid strategic choice that would forgo dismissal of two of an indictment's four counts, the record includes no suggestion that trial counsel ever sought Petitioner's consent to waive constitutional venue claims, let alone obtained that consent.

To the contrary, the record suggests that the lawyer, by mere silence, failed to require the government to prove proper venue by a preponderance of the evidence. The government could not have carried even that lower burden as to Counts 3 and 4 of the indictment. In effect, by his silence counsel tendered a partial guilty plea on behalf of Petitioner. That arguably is inconsistent with *Henderson v. Morgan*, 426 U.S. at 645.

In sum, on these circumstances the decision below arguably is inconsistent with this Court's prior rulings on waiver of constitutional rights.

C. Counsel's Waiver of Venue by Silence: Circuit Split.

Finally, as the Seventh Circuit correctly noted, the circuits are split on whether a bare Rule 29 motion merely forfeits a claim of improper venue, or whether it waives the venue claim. The Second and Fifth Circuits, and now the Seventh, say waiver. *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007); *United States v. Carbajal*, 290 F.3d 277, 289 n.19 (5th Cir. 2002); *United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984); *United States v. Knox*, 540 F.3d 708, 715-16 (7th Cir. 2008); see also *United States v. Carreon-Palacio*, 267 F.3d 381, 390-93 (5th Cir. 2001) (thorough discussion of waiver of venue objection, citing cases from several circuits). Under *Olano*, waiver forecloses review even for plain error. The Sixth Circuit holds to the contrary that a Rule 29 motion fully preserves the venue objection, even if the lawyer never mentions venue. *United States v. Zidell*, 323 F.3d 412, 421 (6th Cir. 2003).

That is a dramatic split. In at least three circuits, an undeveloped Rule 29 argument makes appellate review of improper venue impossible after a criminal conviction, assuming that the accused did not otherwise challenge venue. That is true even though the Constitution twice speaks of venue in criminal cases. In the Sixth Circuit, the same undeveloped Rule 29 argument preserves the issue entirely; the accused may present it on appeal for *de novo* review, hampered not even by plain error doctrine. See generally *Olano*, 507 U.S. 725.

Given the constitutional status that venue enjoys and the striking difference in the availability of appellate review in the circuits, this Court should resolve the split and adopt one national rule.

CONCLUSION

Petitioner prays that the Court grant this Petition and set the case for plenary briefing, argument, and consideration on the merits. Alternatively, this Court may wish to consider granting the writ of certiorari and summarily vacating the judgment of the United States Court of Appeals for the Seventh Circuit below pursuant to SUP. CT. R. 16.1, then remanding to that court for further proceedings not inconsistent with this Court's order.

Respectfully submitted,

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APPENDIX A

540 F.3d 708

United States Court of Appeals, Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Prince S. KNOX, Defendant-Appellant.
No. 07-2552.

Argued May 9, 2008.
Decided Sept. 2, 2008.

Michelle N. Weiss (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Dean A. Strang (argued), Hurley, Burish & Stanton, Madison, WI, for Defendant-Appellant.

Before FLAUM, KANNE, and TINDER, Circuit Judges.

TINDER, Circuit Judge.

Appellant Prince Solomon Knox entered the United States as part of a refugee resettlement program. He was later indicted and convicted essentially for lying to the United States government by denying involvement with armed rebel groups in connection with his admittance into the country. We address three main issues in this appeal – a venue question; Knox's request, which the district court denied, to go to Africa for investigation/depositions; and two challenges to the sufficiency of the evidence.

I. Background

During the 1990s Liberia was in the midst of several civil conflicts. The Department of State, the Office of United Nations High Commissioner for Refugees, and the Department of Homeland Security ("DHS") began a United States resettlement program for Liberians in Côte d'Ivoire (a.k.a. the Ivory Coast) who could not return to Liberia or remain in Côte d'Ivoire because of the civil unrest. Eligible individuals could apply to enter the United States as refugees. Defendant Prince Solomon Knox was from Sierra Leone, but his wife, Elizabeth Knox, from Liberia, could apply for her entire family. Knox, Elizabeth Knox, and their daughter applied under this program. Of course, to be admitted, applicants had to meet the qualifications, one of which, relevant here, deemed persons who had belonged to or assisted disfavored armed groups ineligible.

There are three such rebel groups we concern ourselves with in this case: the National Patriotic Front of Liberia ("NPFL"), the Independent National Patriotic Front of Liberia ("INPFL"), and the Revolutionary United Front ("RUF"). The RUF was known for grievous human rights violations, the disturbing details of which are unnecessary to recount for our present purposes. *See* Revolutionary United Front, http://en.wikipedia.org/wiki/Revolutionary_United_Front (last visited Aug. 4, 2008); *see also Kamara v. Attorney General of the United States,* 420 F.3d 202, 207 (3d Cir.2005) (describing some of the RUF's "grievous human rights violations"). The State

Department has designated the RUF as a terrorist organization on the terrorist exclusion list since December 2001.

On December 9, 2003, a State Department employee interviewed the Knox family in Abidjan, Côte d'Ivoire. At that time, in response to questions from DHS immigration officer David Radel, Knox denied that he had ever been a member of disfavored armed groups, denied that he had assisted them, and denied having served or participated in military service or armed conflict. Similarly, on Form I-590, Registration for Classification as Refugee, Knox answered that he had no membership in and provided no aid to armed groups. He also answered "none" when directed on the form to list "political, professional or social organizations of which I am now or have been a member or with which I am now or have been affiliated with since my 16th birthday." Radel also completed Form G-646, Sworn Statement of Refugee Applying for Admission, into the United States on Knox's behalf. Knox answered "no" to the following questions: "Have you ever provided support, including housing, transportation, communications, funds, documents, weapons or training for any person or organization that has ever engaged in or conspired to engage in sabotage, kidnaping, assassination, hijacking, or any other form of terrorist activity?" and "Have you ever been a representative or member of a terrorist organization or a member of a group which endorses terrorist activity?" These and other similar

statements are also confirmed in Radel's written notes of the interview.

Radel recommended that Knox be resettled in the United States on or about December 9, 2003. Knox entered the United States on April 14, 2004, through the Chicago O'Hare international airport. He presented the I-590 Form stamped by Radel to the DHS officer at O'Hare. Knox then moved to St. Louis, Missouri. It was in Missouri that Knox was arrested on December 21, 2006. The government had come to believe that Knox had belonged to or supported the RUF, NPFL, and/or INPFL, and therefore, lied on the forms and to Radel.

Knox was charged in a four-count indictment – two counts for making materially false statements to federal agents and two counts for visa fraud, in violation of 18 U.S.C. §§ 1001 and 1546. The first count addressed lying under oath on Form I-590, which was submitted at O'Hare to gain entry. The second was for false statements on Form G-646. Count Three was for making similar false statements to Radel in Côte d'Ivoire. Count Four was for lying to an Immigration and Customs Enforcement agent on or about March 29, 2006, "in the Eastern District of Missouri and Northern District of Illinois." (It appears that this "lie" was Knox claiming he had never held a gun, a statement made in a recorded telephone call between Knox and a government agent.) The district court found Knox indigent and appointed counsel.

The factual crux of the case is whether Knox lied about his involvement in these rebel groups. The majority of the events related to the charges occurred in Sierra Leone, Liberia, and Côte d'Ivoire. Accordingly, the defense sought to investigate and possibly depose potential witnesses in West Africa. Knox filed a written application for authorization of extraordinary and substantial travel and expert witness expenses with the intent to ultimately take foreign depositions under Federal Rule of Criminal Procedure 15. The district judge denied the application without prejudice due to "vagueness" and a "failure to address the legal basis for taking foreign depositions in three unidentified West African countries."

Knox filed another motion for leave to take foreign depositions and identified four prospective witnesses by name and address who were believed to have personal first-hand knowledge concerning whether the defendant was a member of any of the relevant groups. Knox also pointed out that the government would be bringing over witnesses from Africa. The court gave Knox an opportunity to supply additional information (costs, etc.), including in camera disclosures of the basis for believing the witnesses would appear voluntarily, how they would be contacted, etc. The government also filed its opposition to Knox's request(s). The court concluded that the defense did not provide enough detailed information, Knox having only explained that travel to West Africa was necessary to investigate, locate, and interview these individuals and that then more

information would be available. The court found this "problematic and unworkable." The defense could not provide the requisite notice of when and where the depositions would occur. The district court also faulted Knox for failing to address the legality of the proposed investigations under the sovereign laws of the relevant foreign nations or the diplomatic implications to the United States. The court found it "speculative" that Knox's proposed depositions would ever even occur or that they would preserve material evidence under these unreliable circumstances. The court, in a separate ruling, also denied expenses for travel and expert services in Africa. Knox persisted nonetheless, filing an emergency motion and an amended emergency motion for the district court to reconsider. The district court was not persuaded, and the court denied the motions for reconsideration.

At trial the government's witnesses testified to the following: they saw Knox serving as a bodyguard for an RUF leader, saw him carrying an AK-47 rifle, saw him at RUF meetings, observed him with RUF members, heard him go by the name of a leader of the INPFL, saw him in RUF apparel, heard him brag about being a rebel fighter, overheard him tell about killing a family, and knew that he was having an affair with an RUF leader's wife. Knox's only trial witness was his estranged wife, who hadn't met him until 1996 or 1997 (a government witness testified regarding events dating as far back as 1992). She denied ever seeing him in rebel garb or associating with the rebel groups. She admitted to a 7-8 month

separation and admitted that Knox never took her to his home and that he told her it was none of her business who his people were when she asked. The government also elicited testimony that Knox hit her and threatened to take their daughter shortly before their interviews with the State Department.

At the close of the government's case the defendant made a Rule 29 motion for acquittal, but cited no specific grounds. He renewed the motion after closing arguments. The jury convicted on all four counts. Knox was sentenced to 12 months' imprisonment and three years of supervised release. His sentence was completed on or about December 14, 2007. Knox is currently in custody with the Bureau of Immigration and Customs Enforcement, which has initiated removal proceedings.

Knox now appeals. There are three major aspects to his appeal that we will take up in turn: a question about proper venue; a review of the district court's decision to deny Knox's request to go to West Africa to investigate and depose potential witnesses; and two sufficiency-of-the-evidence challenges.

II. Venue

Knox argues that venue in the Northern District of Illinois was improper with respect to Counts Three and Four. The general rule is that we review de novo a district court's denial of a motion for judgment of acquittal due to improper venue. *See United States v. Ringer,* 300 F.3d 788, 790 (7th Cir.2002). However,

this itself presents us with a hurdle – whether Knox preserved this issue with his generic Rule 29 motion for acquittal, as to either or both counts, and if not preserved, whether that failure was waiver or forfeiture.

Conventionally, a waiver is a knowing and intentional relinquishment of a right, while forfeiture is the result of unintentional relinquishment. *E.g., United States v. Charles,* 476 F.3d 492, 495 (7th Cir.2007). Waiver precludes review, whereas forfeiture permits review for plain error. *Id.* In *Ringer* we found that "[a] claim of improper venue is waived if the issue is apparent on the face of the indictment and an objection is not made before the close of the government's case." *Ringer,* 300 F.3d at 790. We continued, "[I]f the indictment does not provide notice of a possible defect in venue and the government rests without proving that the crimes occurred in the district charged, the defendant may then file a venue objection in a motion for acquittal." *Id.*

A. Count Three

We begin with Count Three. The alleged violation of 18 U.S.C. § 1001 occurred "in Abidjan, Ivory Coast" according to the indictment. The indictment did not in any way plead that the alleged false statements with which Knox was charged had any impact in the Northern District of Illinois. Therefore, we conclude, without much difficulty, that notice of a possible defect in venue was "apparent on the face of the

indictment." Accordingly, Knox waived the argument by not making an objection before the close of the government's case. *Id.*; *United States v. Brandon,* 50 F.3d 464, 469 (7th Cir.1995); *United States v. John,* 518 F.2d 705, 709 (7th Cir.1975); *United States v. Bohle,* 445 F.2d 54, 58-59 (7th Cir.1971) (explaining that "where the fact of improper venue is apparent on the face of the indictment, it has been uniformly held that the objection is waived if not presented before the close of the Government's case" (citing Wright's Federal Practice & Procedure: Criminal § 306)), *overruled on other grounds by United States v. Lawson,* 653 F.2d 299, 303 n. 12 (7th Cir.1981); *see also United States v. McDonough,* 603 F.2d 19, 22 n. 1 (7th Cir.1979).

Knox urges us to discard *Ringer*'s application of the waiver standard and apply the distinction we now draw between waiver and forfeiture – which Knox believes would result in our finding that he only forfeited, rather than waived, the argument. We disagree, however, with Knox's premise that our court's more recent applications of the waiver/forfeiture distinction are inconsistent with *Ringer.* Where venue was not adequately pleaded from the outset and the potential defect is apparent on the face of the indictment (such as this case where the only location mentioned is in Africa), failing to raise such an obvious issue is logically considered a knowing and intentional relinquishment. Therefore, consistent with both our traditional waiver/forfeiture distinction and our governing case law, Knox waived any venue

argument with respect to Count Three by not raising a venue objection before the close of the government's case.[1]

B. Count Four

The venue issue regarding Count Four is more difficult. Count Four of the indictment alleged that the 18 U.S.C. § 1001 violation occurred "in the eastern District of Missouri and the Northern District of Illinois." Therefore, unlike Count Three that only mentioned Côte d'Ivoire, we cannot say that any potential venue defect presented itself on the face of the indictment. As we said in *Ringer,* "if the indictment does not provide notice of a possible defect in venue . . . the defendant may then file a venue objection in a motion for acquittal" at the end of the government's case. *Ringer,* 300 F.3d at 790. Thus we are presented with the question of whether the bare Rule 29 motion, which did not mention venue (or anything else) specifically, was sufficient to preserve the venue issue.[2]

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[1] Even if we were to reject *Ringer* as Knox requests and somehow conclude that he had until the end of the government's case to raise a venue objection, we would nevertheless find that he waived the argument, because his "objection" at the close of the government's case, discussed *infra* in Part B, was inadequate and did not preserve the venue issue for appeal.

[2] The relevant exchanges were brief indeed. At the end of the government's case, counsel for Knox addressed the court: "I would make a rule 29 motion for judgment of acquittal on all

(Continued on following page)

The government has the burden of proving venue by a preponderance of the evidence. *E.g., United States v. Muhammad,* 502 F.3d 646, 652 (7th Cir.2007). In *United States v. Jones*, we found that "the motion for acquittal made at the conclusion of all the evidence properly raised the question of venue in the court below." 174 F.2d 746, 748 (7th Cir.1949). We explained that it was a challenge that the government failed in its proof and that the rules do not require specifics in the motion. The government has a duty to prove its case, including venue, and if it "is challenged as to sufficiency by a general motion for acquittal, it is the Government's duty to require the defendant to be specific in his objection, and a failure to do so will not enable the Government on appeal to say that the question was not specifically raised below." *Id.*

However, thirty years later we expressed doubt about *Jones* and have continued to move away from that holding. *McDonough,* 603 F.2d at 22 ("[W]e have some question about the continued viability of the *Jones* rule. . . ."). In *McDonough,* distinguishing

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four counts of the indictment, but I will waive any argument at this time." The judge responded at once, first noting his construction of the evidence in a light most favorable to the government, then finding "[T]he government has established a prima facie case as to all four counts." Later, after closing arguments, Knox's counsel again requested "[C]ould the record reflect a renewal of my Rule 29 motion of acquittal, and I will waive argument?" The court responded: "All right. Your motion is noted and denied."

without overruling *Jones*, we focused on the district judge's question asking if there was anything specific that would justify a directed acquittal, and found that "the failure to urge the matter [of venue] when asked to be specific forecloses, in our opinion, raising the question on this appeal." *Id.* We criticized the defendant's interpretation of *Jones* which would give "the defendant the right to conceal possible reversible error, even . . . when the grounds for objection would have been . . . easily discovered." *Id.* We also went on to discuss the unique nature of venue, explaining that while part of the government's case, it can be waived, is not part of the charged offense, and need only be proved by a preponderance of the evidence. *Id.*

Similarly in *United States v. Todosijevic,* 161 F.3d 479, 482 (7th Cir.1998), we found a Rule 29 motion insufficient to preserve an issue "because [the defendant] rests her current challenge on grounds *different* from those she relied on in her motion to the trial court." *Id.* We highlighted, as in *McDonough,* the defendant's failure to raise additional issues in response to the judge's query as to whether there were other possible grounds. *See also id.* at 482 n. 3 (mentioning another case in which we had explained in dicta that "the defendant waived the sufficiency of evidence argument on all grounds except that which he relied upon at the trial court level"). And in *United States v. Rodriguez*, we concluded, in dicta, that the defendant's "contention with respect to venue [wa]s untimely" because his "motion for acquittal did not

raise the venue issue." 67 F.3d 1312, 1317-18 (7th Cir.1995).

Other circuits seem to follow approaches more akin to our recent cases rather than the approach in *Jones*. Many cases conclude, similar to our approach in *Todosijevic,* that if specific issues are argued with the motion for acquittal, the ones that are not asserted are waived. *See, e.g., United States v. Phillips,* 477 F.3d 215, 219 (5th Cir.2007) (finding when a defendant asserts, in a Rule 29 motion, specific grounds for a specific element of a specific count, he waives all others for that count); *United States v. Chance,* 306 F.3d 356, 369 (6th Cir.2002) ("Although specificity in a Rule 29 motion is not required, where the defendant makes a Rule 29 motion on specific grounds, all grounds not specified in the motion are waived."). Others conclude more directly that an objection to venue is waived when not specifically raised in the Rule 29 motion. *See, e.g., United States v. Rommy,* 506 F.3d 108, 119 (2d Cir.2007) ("[T]he law treats objections to venue as waived 'unless specifically articulated in defense counsel's motion for acquittal.'"); *United States v. Carbajal,* 290 F.3d 277, 289 n. 19 (5th Cir.2002) ("[The defendant] failed to preserve this issue for appeal by specifically raising the issue in his motion for acquittal or by requesting a jury instruction on venue."); *United States v. Potamitis,* 739 F.2d 784, 791 (2d Cir.1984) ("A general motion for a judgment of acquittal . . . is not sufficient to raise and preserve for appeal the question of venue."). *But see United States v. Zidell,* 323 F.3d 412,

421 (6th Cir.2003) (concluding that a general Rule 29 motion preserved the venue challenge).

In reaching these conclusions, these courts focused, as we have in this circuit, on the unusual status of venue. While very important – as the defendant notes, it's in the Constitution twice, U.S. Const. art. III, § 2, cl. 3; amend. VI – venue is universally recognized as waivable. It is not an element of the charged crimes. And, as such, while the burden does rest with the prosecution, that burden of proof is only a preponderance of the evidence (unlike the "beyond a reasonable doubt" standard for the elements of the crime itself). Furthermore, a defendant should not be permitted to hide in the weeds with an objection (especially on a waivable issue with a lower proof burden) only to pounce on appeal just in case things do not go as desired in the court below. The take-away message is that venue can be waived and a defendant needs to be specific in a motion for acquittal in order to preserve a venue argument for appeal.

Unlike *McDonough* and *Todosijevic,* the record here does not reflect any inquiry on the part of the judge inviting the defendant to argue specific grounds of the Rule 29 motion. Therefore, we cannot simply distinguish *Jones*. Given the move in our own circuit away from *Jones* and the similar treatment in cases from our sister circuits, we take this opportunity to

clarify our position and in doing so overrule *Jones*.[3] We now make explicit that a bare Rule 29 motion for acquittal that does not even mention venue waives the venue argument and fails to preserve the issue for appeal.[4] Applying this to the facts of the instant case we find that Knox did not preserve the venue challenge. Thus, the issue is waived, and nothing more need be said.

III. Foreign Funding

Knox applied for funds to travel to West Africa to investigate and depose witnesses under 18 U.S.C. § 3006A(e)(1) and Federal Rule of Criminal Procedure 15; the district judge denied his requests. 18 U.S.C. § 3006A(e)(1) authorizes investigative and expert expenditures on behalf of indigent defendants when necessary for adequate representation. We review a district court's decision to grant or deny such funds

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[3] This opinion has been circulated among all judges of this court in regular active service under Circuit Rule 40(e). No judge favored a rehearing en banc on the question of overruling *United States v. Jones*.

[4] This conclusion is analogous to our discussion *supra* explaining that where a venue issue is obvious on the face of the indictment, the failure to raise the issue is a knowing relinquishment (especially since venue is waivable anyway). *See Ringer*, 300 F.3d at 790. Once the government reaches the end of its case without proving venue, then it's just as if the deficiency is obvious on the face of the indictment, and a defendant's failure to raise a venue objection by that time is logically considered knowing and intentional.

under 18 U.S.C. § 3006A(e)(1) for abuse of discretion. *See United States v. Smith,* 502 F.3d 680, 686 (7th Cir.2007). Rule 15 of the Federal Rules of Criminal Procedure also permits a defendant to make a motion to depose witnesses – an unusual occurrence in a criminal case – when "exceptional circumstances" warrant it. This is also reviewed for abuse of discretion. *See, e.g., United States v. Thomas,* 62 F.3d 1332, 1340 (11th Cir.1995); *United States v. Kelley,* 36 F.3d 1118, 1125 (D.C.Cir.1994).

In *Smith,* the defendant sought funds for a fingerprint expert. We explained that under 18 U.S.C. § 3006A(e)(1) "[t]he government will give an indigent defendant access to expert services adequate to facilitate the defendant's representation if the court finds that the services are necessary" and that they should be provided "where 'a reasonable attorney would engage such services for a client having the independent financial means to pay for them.'" *Smith,* 502 F.3d at 686 (citing *United States v. Cravens,* 275 F.3d 637, 639 (7th Cir.2001)). Furthermore, before granting the expenditures, the court may consider whether the defendant has a "plausible defense" as the government does not have to "finance a fishing expedition." *United States v. King,* 356 F.3d 774, 778 (7th Cir.2004) (internal quotation omitted).

We addressed the Rule 15 "exceptional circumstances" requirement briefly in *United States v. Morrison,* 946 F.2d 484, 490 (7th Cir.1991), where we affirmed a district court's denial of a request for money to travel to Puerto Rico to interview witnesses,

take depositions, and investigate the scene of a drug ring's alleged operations. We explained that "a showing of exceptional circumstances must be considerably more concrete and particularized than mere speculation about the possible need for depositions in the future." *Id.* Beyond this brief treatment in *Morrison,* we have not had the occasion to outline any "test" for when the "exceptional circumstances" threshold would be met justifying authorization of foreign depositions; therefore we take note of some factors considered relevant by other circuits. The Ninth Circuit considered whether the deponent would be available at the proposed location of the deposition, whether the deponent would be willing to testify, and the safety of United States officials in going to the foreign location. *See United States v. Olafson,* 203 F.3d 560, 567 (9th Cir.2000). The Eleventh Circuit focused on the materiality of the proposed testimony, the availability of the witness, whether injustice will otherwise result without the material testimony that the deposition could provide, and whether countervailing factors would make the deposition unjust to the nonmoving party. *See Thomas,* 62 F.3d at 1340-41. The D.C. Circuit listed as critical factors the materiality of the testimony and the unavailability of the witness to testify at trial and also noted that there is "typically some showing, beyond 'unsubstantiated speculation,' that the evidence exculpates the defendant." *Kelley,* 36 F.3d at 1125 (citing cases from the Third, Fifth, and Ninth Circuits).

As we described, Knox made many attempts to obtain authorization for expenses to investigate and depose witnesses in the West African countries of Sierra Leone, Liberia, and Côte d'Ivoire. We are not unsympathetic to his desire to investigate and depose witnesses there – he is correct that many of the events relevant to his case occurred there. However, we do not find that the district court abused its discretion in denying funds for a proposal accurately characterized by the district court as "problematic and unworkable."

Specifically, addressing Rule 15's requirements, we conclude Knox's request was not sufficiently "concrete and particularized" to justify authorizing the expenditures. *Morrison,* 946 F.2d at 490. Moreover, Knox's request would fail under nearly all of the factors we cited from other circuits. Knox could not provide when or where the potential witnesses would be found. He had their addresses but offered nothing to establish the individuals would be present at any given date or time – or how he would get over the hurdle of no phone or email availability. For example, one witness's address was in Sierra Leone, but Knox indicated that the witness was also believed to spend time in Côte d'Ivoire and that he might be found there; plans for tracking this witness down were not offered. Considering this search would involve crossing international borders, it is not an insignificant question. Such an absence of attention to detail

pervaded Knox's entire request.[5] Similarly, the materiality of the potential testimony seemed based entirely on conjecture and speculation. No details were given regarding the expected substance of their testimony or how it would exculpate Knox. Knox also did not disclose any basis, other than a familial relation to the defendant, for why these individuals would be willing to testify voluntarily. There was also a rather cavalier attitude toward international law and diplomatic concerns raised by the district judge. Knox argued that such matters were not his concern; nevertheless, surely he cannot expect a United States court to authorize such expenses to engage in investigating terrorist group membership without detail on the legality of investigating and taking depositions in these countries. In the end Knox simply did not demonstrate the requisite "exceptional circumstances" for Rule 15 depositions.

Knox argues that he may have been able to furnish these answers if he had been given investigative funding under § 3006A(e)(1). He asserts that his request was a two-step process and that he could have been given funds to go investigate, after which

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[5] In essence, Knox was seeking funds to first find these individuals, then to interview them, and only after that to announce whether he would seek to depose them. If nothing else was flawed about this request, the holding pattern that would be imposed on the attorney for the government raises serious concerns. Government counsel would need to be in a position to be in an unspecified location in West Africa, perhaps on short notice, for an indefinite period.

he could satisfy the Rule 15 requirements. But we conclude his § 3006A(e)(1) requests failed for many of the same reasons. He could not provide sufficient details for the trip regarding when, where, and how he would make contact with the witnesses. We understand that there were difficulties given the undeveloped communications infrastructure in some areas; however, Knox did not suggest how he intended to overcome this challenge. He provided only a vague trip itinerary, and the estimated expenses were equally broad and without detail, as well as possibly in excess of the statutory amount. *See* 18 U.S.C. § 3006A(e)(3) ("Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $1,600, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court. . . ."). His "spreadsheet" for the 12-day trip had only six itemized entries and totaled $34,565.30. (Although in a later motion he did indicate the costs would be less.) Knox did not make a convincing showing that these expenses were "necessary" for adequate representation and that "a reasonable attorney would engage such services for a client having the independent financial means to pay for them."

To recap, while Knox was persistent in his requests, those requests simply did not provide enough information to justify granting them. He had not contacted potential witnesses; he could not provide a

proposed itinerary; he did not sufficiently address the practical or diplomatic issues inherently related to going to foreign countries for these purposes. He could not provide the government with notice of when or where such depositions might occur or even a proposal of how this might be arranged. While some difficulties making arrangements to interview and depose these witnesses may be understandable given the remote areas being dealt with, it is those very circumstances and the nature of this case (involving terrorist activities and rebel groups) which heightened the concerns and made the need for planning more acute. Too many unknowns remained unresolved and unreserved for the government to foot the bill for what appeared a bit like a "fishing expedition" into seemingly unknown and potentially shark-infested waters. Knox has not shown on appeal that the district court abused its discretion in denying the requests.

We also note that Knox presented a constitutional argument on this issue, specifically raising his Sixth Amendment right to present a defense. However, as Knox admitted in his brief, this right "is not unlimited and may 'bow to accommodate other legitimate interests in the criminal trial process.'" *Horton v. Litscher,* 427 F.3d 498, 504 (7th Cir.2005) (quoting *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). Requiring more from Knox in this instance to support his requests was quite reasonable and clearly in furtherance of other legitimate interests. Certainly, there are

occasionally situations where procedural rules must bend to the demands of the Constitution. *See, e.g., Chambers,* 410 U.S. at 302-03, 93 S.Ct. 1038. Knox, however, has presented no compelling reason that the rules applied here, Rule 15 and § 3006A, should bend to accommodate his "fishing expedition," and he has presented no persuasive argument that the rules were "arbitrary" or "disproportionate to the purposes they are designed to serve." *Horton,* 427 F.3d at 503 ("[R]rules 'designed to assure both fairness and reliability in the ascertainment of guilt and innocence' . . . do not abridge an accused's right to present a defense so long as they are not 'arbitrary or disproportionate to the purposes they are designed to serve.'") (quoting *Chambers,* 410 U.S. at 302, 93 S.Ct. 1038 and *Rock v. Arkansas,* 483 U.S. 44, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). We do not find that his constitutional rights were violated, especially since he fell short in establishing the materiality of the potential testimony and the availability of any of the potential witnesses and did not establish the "necessity" of the funding, as we discussed *supra. Cf. United States v. Loggins,* 486 F.3d 977, 982 (7th Cir.2007) (finding the evidence at issue "lack[ed] the[e] exculpatory significance and the reliability necessary to support a Sixth Amendment violation").

IV. Sufficiency of the Evidence

Lastly, Knox challenges the sufficiency of the evidence with respect to Counts One and Two. We review de novo and will reverse a conviction only

when no rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt. *E.g., United States v. Mendoza,* 510 F.3d 749, 752 (7th Cir.2007). This standard is "highly deferential" and "nearly insurmountable." *Id.* (internal quotations omitted).

Count One charged Knox in connection with responding "none" when asked to list political, professional, or social organizations of which he was now or has been a member or with which he was or had been affiliated since his 16th birthday on Form I-590. He argues that the government never proved that the RUF or any other armed rebel group at issue was a "political, professional, or social organization." He makes an analogy to the United States Army, expressing doubt that a United States soldier would say he belonged to a "political, professional, or social organization." The RUF and related groups were described as terrorist organizations, not groups with political or social agendas. Knox agrees the evidence supported a finding that he belonged to an armed group, but he points out that was not what the government had to show.

Knox's argument with respect to Count Two is similar. Count Two alleges two knowing false statements of material fact: First, that Knox lied on Form G-646 denying he ever provided support, including housing, transportation, communications, funds, weapons, documents, etc. for any person or organization that has engaged in or conspired to engage in

sabotage, kidnaping, assassination, hijacking, or any other form of terrorist activity; Second, that he lied on Form G-646 when he denied ever being a representative or member of a terrorist organization or a member of a group which endorses terrorist activity. Knox argues that while he stipulated at trial that the RUF is on the terrorist exclusion list, the government did not establish that Knox knew any of this when he was responding to Radel's questions. He asserts that the testimony from the government's witnesses establishing Knox's connection with these groups (serving as an armed guard at a speech, wearing rebel garb, etc.) falls short of acts (kidnaping, assassination, hijacking, etc.) referred to in the form and does not establish that Knox knew that the RUF was a terrorist organization engaged in such acts.

The government, in response to the Count One argument, notes that testimony from multiple witnesses established that the RUF was a political or social organization. Specifically an expert testified that there were social, political, and military aspects to the organization. Testimony from other witnesses included references to "battling the government" and other similar comments. The government's response with respect to Count Two is that Knox's claim that he did not know RUF engaged in terrorist activities, etc. is incredible. Witnesses testified that Liberia and Côte d'Ivoire were war-torn countries experiencing severe civil conflict with armed groups burning whole villages and massacring civilians. In fact, these

circumstances are what prompted the creation of the refugee program to which the Knox family applied.

Given a defendant's "uphill battle" in mounting a sufficiency-of-the-evidence challenge, we conclude the evidence was sufficient for any trier of fact to find Knox guilty of visa fraud as charged in Counts One and Two. The testimony collectively was sufficient to enable a jury to reasonably conclude that the rebel groups at issue would accurately be described as "political, professional, or social" organizations. Witnesses also testified that Knox served as a bodyguard for a RUF leader, was seen at RUF meetings, was seen carrying a gun, had said he killed a family, and went by the name of an INPFL leader, among other things. Given this involvement and the state of civil unrest generally, a jury could reasonably infer, with little effort, that Knox could not help but be aware of the group's terrorist bent. Thus, Knox does not prevail on these sufficiency-of-the-evidence challenges.

V. Conclusion

For the foregoing reasons, the judgment of conviction is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	No. 06CR0917
v.	Violations: Title 18, United States Code, Sections 1001(a)(2) and 1546(a)
PRINCE SOLOMON KNOX	(Filed Dec. 6, 2006)

COUNT ONE

The SPECIAL DECEMBER 2005 GRAND JURY charges:

1. At times material to this indictment:

a. During much of the 1990s, conflicts in parts of West Africa forced many residents of West Africa to flee their homes and enter the Ivory Coast where they sought safety. Many Liberians fled fighting in Liberia and entered the Ivory Coast during this time.

b. The Revolutionary United Front ("RUF") was a rebel army comprised mainly of Sierra Leoneans that fought a failed insurrection in Sierra Leone from about 1991 to 2002. The National Patriotic Front of Liberia ("NPFL") was an armed rebel group closely aligned with RUF, and the Independent

National Patriotic Front of Liberia ("INPFL") was a separate rebel faction of the NPFL.

c. In about September 2002, conflict broke out in the Ivory Coast between rebels in the north of the country and the Ivorian government forces based in the south. The Department of State ("DOS"), United Nations High Commissioner for Refugees, and Immigration and Naturalization Service ("INS") (which is now known as U.S. Citizenship and Immigration Services, an agency of the Department of Homeland Security), instituted a program to resettle Liberians living in the Ivory Coast to the United States (the "Ivory Coast Refugee Program"). The Ivory Coast Refugee Program did so by identifying and assisting specific individuals who were potentially eligible for admission to the United States as "refugees" under Section 207 of the Immigration and Nationality Act ("INA").

d. As a result of the many military conflicts and civil wars in the region and the serious human rights abuses that resulted, those implementing the Ivory Coast Refugee Program sought to identify former and current soldiers and other armed combatants in order to ensure that no individual admitted under the program had engaged in persecution or belonged to groups that engaged in human rights violations. In general, former and current soldiers and armed combatants were deemed by INS to be presumptively ineligible for admission under the Ivory Coast Refugee Program.

e. An applicant for admission to the United States as a refugee under the Ivory Coast Refugee Program was required by INS to accurately and truthfully complete under oath INS Form I-590, entitled "Registration for Classification as Refugee." After completing Form I-590, each applicant was subjected to an interview under oath by an INS officer. During each interview, the INS officer reviewed with the applicant the answers he had provided on Form I-590, and questioned the applicant in order to obtain additional information material to the decision whether to admit the applicant to the United States as a refugee. Certain oral responses provided by the applicant were used by the INS officer to complete a form entitled, "Sworn Statement of Refugee Applying for Admission into the United States," also known as Form G-646. During the sworn interview, the applicant signed the completed Form I-590 and Form G-646 under oath in the presence of the INS officer.

f. Ivory Coast Refugee Program applicants found by INS to be eligible for admission to the United States as refugees were thereafter issued a document by the United States government entitling them to lawful admission into and residence in the United States. An applicant accepted into the Ivory Coast Refugee Program subsequently used the completed and sworn Form I-590 as a travel document to enter the United States.

g. Defendant PRINCE SOLOMON KNOX applied for admission to the United States under the

Ivory Coast Refugee Program. Based upon the information KNOX provided during the application process, the United States Government issued KNOX a document, namely a Form I-590, entitling him to lawful admission into and residence in the United States. KNOX subsequently used this Form I-590 to enter the United States at O'Hare International Airport in Chicago, Illinois, on or about April 14, 2004.

2. On or about December 9, 2003, in Abidjan, Ivory Coast,

PRINCE SOLOMON KNOX,

defendant herein, under penalty of perjury, knowingly subscribed as true a false statement with respect to a material fact in an application required by the immigration laws and regulations prescribed thereunder, namely, an "Immigration and Naturalization Form I-590, Registration for Classification as Refugee," which he presented to federal authorities in Chicago, Illinois, upon entry into the United States, and in response to Item Number 14, directing defendant to list "Political, professional or social organizations of which I am now or have been a member or with which I am now or have been affiliated since my 16th birthday," defendant stated "None," when in truth and fact, as defendant well knew, defendant had been affiliated with RUF, NPFL, and INPFL;

In violation of Title 18, United States Code, Section 1546(a).

COUNT TWO

The SPECIAL DECEMBER 2005 GRAND JURY further charges:

1. Paragraph 1 of Count One of this indictment is realleged and incorporated herein as if fully restated herein.

2. On or about December 9, 2003, in Abidjan, Ivory Coast,

PRINCE SOLOMON KNOX,

defendant herein, knowingly made false statements with respect to material facts in a document required for the administration of refugee admissions under the immigration laws of the United States and regulations prescribed thereunder, namely, an "Immigration and Naturalization Form G-646, Sworn Statement of Refugee Applying for Entry into the United States," in that:

a. On defendant's Form G-646, in response to question 4c, "Have you ever provided support, including housing, transportation, communications, funds, documents, weapons or training for any person or organization that has ever engaged in or conspired to engage in sabotage, kidnapping, assassination, hijacking, or any other form of terrorist activity," defendant answered "No," when in truth and fact, as defendant well knew, defendant had provided support for RUF, NPFL, and INPFL, by acting as a combatant for those organizations, which organizations had

engaged in sabotage, kidnapping, assassination, hijacking, and other forms of terrorist activity;

b. On defendant's Form G-646, in response to question 4d, "Have you ever been a representative or member of a terrorist organization or a member of a group which endorses terrorist activity?" defendant answered "No," when in truth and fact, as defendant well knew, defendant had been a combatant with RUF, NPFL, and INPFL;

In violation of Title 18, United States Code, Section 1546(a).

COUNT THREE

The SPECIAL DECEMBER 2005 GRAND JURY further charges:

1. Paragraph 1 of Count One of this indictment is realleged and incorporated herein as if fully restated herein.

2. On or about December 9, 2003, in Abidjan, Ivory Coast,

PRINCE SOLOMON KNOX,

defendant herein, knowingly and willfully made materially false statements and representations in a matter within the jurisdiction of the INS, an agency within the executive branch of the Government of the United States, in that defendant falsely stated and represented, in substance, in an interview under oath

with an INS officer that he (1) had performed no past military service; (2) had not been a member in armed groups; (3) had provided no aid to armed groups; (4) had not been a representative or member of a terrorist organization or a member of a group which endorsed terrorist activity; and (5) had never held a weapon.

In violation of Title 18, United States Code, Section 1001(a)(2).

COUNT FOUR

The SPECIAL DECEMBER 2005 GRAND JURY further charges:

1. Paragraph 1 of Count One of this indictment is realleged and incorporated herein as if fully restated herein.

2. On or about March 29, 2006, in the Eastern District of Missouri and Northern District of Illinois,

PRINCE SOLOMON KNOX,

defendant herein, knowingly and willfully made materially false statements and representations in a matter within the jurisdiction of the Department of Homeland Security Immigration and Customs Enforcement ("ICE"), an agency within the executive branch of the Government of the United States, in that defendant falsely stated and represented, in

substance, in an interview with a DHS-ICE officer that he had never held a gun.

In violation of Title 18, United States Code, Section 1001(a)(2).

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

Supreme Court, U.S.
FILED
JAN 30 2009
OFFICE OF THE CLERK

No. 08-569

In the Supreme Court of the United States

PRINCE S. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal criminal defendant may waive venue.

2. Whether counsel may waive venue on the defendant's behalf.

3. Whether the court of appeals erred in concluding that petitioner waived his venue objection by failing to raise it in the district court.

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In the Supreme Court of the United States

No. 08-569

PRINCE S. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 540 F.3d 708.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2008. The petition for a writ of certiorari was filed on October 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of making a false statement in an immigration document, in violation of 18 U.S.C. 1546(a), and two counts of making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). He

was sentenced to 12 months of imprisonment. The court of appeals affirmed. Pet. App. 1-25.

1. In response to civil unrest in Liberia and the Côte d'Ivoire (the Ivory Coast), the Department of Homeland Security (DHS) and other governmental agencies established a resettlement program permitting certain Liberians living in Côte d'Ivoire to enter the United States as refugees. Any individual who had belonged to an armed rebel group or engaged in terrorist activity was ineligible to participate. Pet. App. 2-3.

Petitioner applied for the program. On December 9, 2003, a DHS immigration officer interviewed petitioner in Abidjan, Côte d'Ivoire. Both in his oral responses and on two written forms, petitioner denied having provided aid to any armed groups or otherwise supporting terrorist organizations. In reliance on those answers, the immigration officer approved petitioner's application. Petitioner was admitted to the United States through Chicago O'Hare International Airport and settled in St. Louis, Missouri. Pet. App. 2-4.

After petitioner's resettlement, the United States learned that he had been actively involved in the Revolutionary United Front (RUF), a rebel group that was designated a terrorist organization by the State Department in 2001 based largely on its record of grievous human rights abuses. Petitioner served as a bodyguard for an RUF leader, attended RUF meetings, carried an AK-47 rifle, and wore rebel garb. Pet. App. 2-3, 6.

2. On December 6, 2006, a grand jury sitting in the Northern District of Illinois returned an indictment charging petitioner in four counts. Pet. App. 26-33. Counts One and Two, which are not at issue here, charged petitioner with violations of 18 U.S.C. 1546(a) for making false statements on the written immigration

forms he completed in the Ivory Coast and then presenting one of those forms to federal authorities upon his entry to the United States. Pet. App. 26-31. Count Three alleged that petitioner made a false statement to a federal officer "[o]n or about December 9, 2003, in Abidjan, Ivory Coast," in violation of 18 U.S.C. 1001(a)(2). Pet. App. 31. Count Four charged petitioner with making a false statement to a federal officer "[o]n or about March 29, 2006, in the Eastern District of Missouri and Northern District of Illinois," also in violation of 18 U.S.C. 1001(a)(2). Pet. App. 32. That count was based on a recorded telephone call in which petitioner, who was in St. Louis, told a DHS agent located in Chicago that petitioner had never carried a gun. *Id.* at 4.

Petitioner was first arrested on these charges in the Eastern District of Missouri, Docket Entry No. 5, and he proceeded to trial in the Northern District of Illinois. At the conclusion of the government's case-in-chief and again after closing arguments, petitioner's counsel moved orally for a judgment of acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 7, 10-11 & n.2. At neither point did counsel specify the grounds for the motion or raise the issue of venue. *Ibid.* The district court twice denied the motion, and the jury found petitioner guilty on all counts. *Id.* at 7.

3. The court of appeals affirmed. Pet. App. 1-25. On appeal, petitioner argued for the first time that venue in the Northern District of Illinois was improper on Counts Three and Four. Def. C.A. Br. 26-37. Petitioner contended that the false statement offense alleged in Count Three occurred entirely in Côte d'Ivoire and therefore that, under 18 U.S.C. 3238, venue on that count lay only in the Eastern District of Missouri, the district in which petitioner had been "arrested or * * * first brought"

and "the district of [his] last known residence." Pet. C.A. Br. 30-31. Petitioner argued that venue was improper on Count Four because he was in Missouri at the time he participated in the recorded telephone call from which that charge arose. *Id.* at 33-35.

The court of appeals held that petitioner had waived those venue objections by failing to raise them in the district court. As to Count Three, the court observed that because that count alleged acts occurring only in Côte d'Ivoire, the venue defect was "apparent on the face of the indictment." Pet. App. 8-9. Relying on circuit precedent, the court concluded that petitioner was therefore required to challenge venue on that count before the close of the government's case and that his failure "to raise such an obvious issue is logically considered a knowing and intentional relinquishment." *Id.* at 9.

The court deemed the issue of waiver "more difficult" on Count Four. Pet. App. 10. Because any venue defect on that count was not apparent from the indictment, the court reasoned, petitioner was permitted to raise the issue for the first time in a motion for acquittal at the end of the government's case. *Ibid.* The court concluded, however, that petitioner's "bare Rule 29 motion, which did not mention venue (or anything else) specifically, was [in]sufficient to preserve the venue issue." *Ibid.* The court acknowledged that its earlier decision in *United States* v. *Jones*, 174 F.2d 746, 748 (7th Cir. 1949), had deemed a general motion for acquittal adequate to preserve a venue challenge when the alleged defect was not obvious from the indictment. Pet. App. 11. The court noted, however, that its more recent cases had distinguished or limited that ruling and that most other courts of appeals had concluded "that an objection

to venue is waived when not specifically raised in the Rule 29 motion." *Id.* at 13; see *id.* at 11-13. The court of appeals observed that venue occupies an "unusual status" because although it is a constitutional requirement, it is not an element of any offense, may be proved by a preponderance of the evidence, and is "universally recognized as waivable." *Id.* at 14. In addition, the court reasoned that "a defendant should not be permitted to hide in the weeds with an objection (especially on a waivable issue with a lower proof burden) only to pounce on appeal just in case things do not go as desired in the court below." *Ibid.* Based on that analysis, the court overruled *Jones* and held that "a defendant needs to be specific in a motion for acquittal in order to preserve a venue argument for appeal." *Ibid.*[1] Because petitioner had not specified venue as a ground for acquittal in the district court, the court deemed his objection waived and therefore did not consider it further. *Id.* at 15.

ARGUMENT

Petitioner contends (Pet. 7-16) that the Court should grant review to decide whether a defendant may waive venue; whether, if so, the defendant must do so personally; and whether the failure to raise a specific venue objection in the district court constitutes such a waiver. There is no merit to petitioner's arguments or any division of authority on the first two questions. Although the third question implicates a circuit conflict, the decision below is correct and accords with the position of the large majority of the courts of appeals. The issue on which the circuits disagree, moreover, is not likely to

[1] Because the panel was overruling prior circuit precedent, it circulated its opinion to the entire Seventh Circuit for approval. No judge of that court voted to hear the case en banc. Pet. App. 15.

arise with significant frequency. This Court's review is therefore not warranted.

1. Article III of the Constitution directs that criminal trials must "be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const. Art. III, § 2, Cl. 3. The Sixth Amendment further provides for trial by a "jury of the State and district wherein the crime shall have been committed." *Id.* Amend VI. Those provisions embody a "public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused." *Johnston* v. *United States*, 351 U.S. 215, 220-221 (1956).

Petitioner argues (Pet. 8-10) that the constitutional venue provisions impose a constraint on the power of federal courts that defendants may not waive. He points to no court that has ever so held but rather relies (Pet. 8-9) on a series of decisions from this Court limiting the ability of litigants to waive subject matter jurisdiction or the right to an Article III trier of fact. Those cases are inapposite because, contrary to petitioner's contention, this Court has squarely stated that a defendant "can waive his right to be tried in the State and district where the crime was committed." *Singer* v. *United States*, 380 U.S. 24, 35 (1965); see *Borchardt* v. *United States*, 469 U.S. 937, 945 (1984) (Brennan, J., dissenting) (noting principle that "a defendant may waive [venue] in appropriate circumstances"). That rule stems from the Court's recognition that "[t]he provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *United States* v. *Cores*, 356 U.S. 405, 407 (1958). Consistent with those cases, the

lower courts agree that "venue is a privilege provided for the benefit of the accused, rather than a limitation on the jurisdiction of the court." 2 Charles Alan Wright, *Federal Practice and Procedure* § 306, at 341-342 (3d ed. 2000).

2. There is no merit to petitioner's contention (Pet. 13-14) that the decision below conflicts with *Florida* v. *Nixon*, 543 U.S. 175 (2004), because it permits waiver of venue by counsel rather than the defendant himself. *Nixon* concluded that although a small set of "decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate," the general rule is that counsel need not "obtain the defendant's consent to 'every tactical decision.'" *Id.* at 187 (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988)). Whether to assert the right to stand trial in a particular location is not of the same importance or consequence as the type of decision that a defendant must make personally, such as "whether to plead guilty, waive a jury, testify in his or her defense, or take an appeal." *Ibid.* (quoting *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983)). The venue right is animated primarily by considerations of convenience for the defendant, *Cores*, 356U.S. at 407, and the determination of whether to exercise that right is a tactical matter properly entrusted to counsel. See *Taylor*, 484 U.S. at 417-418 (an attorney has authority to manage most aspects of the defense without obtaining his client's approval).

3. Petitioner also contends (Pet. 10-15) that this Court should review the conclusion of the court of appeals that petitioner waived his venue objection by failing to raise it at trial. He argues that the omission resulted only in forfeiture and therefore does not preclude review for plain error under Federal Rule of Criminal

Procedure 52(b). That contention is erroneous, and although the issue implicates a split of authority among the circuits, this Court's review is unnecessary.

a. The court of appeals correctly deemed petitioner's venue objection waived. As petitioner acknowledges, "[s]ome constitutional rights may be waived by counsel's, or the accused's, failure to object." Pet. 11. For the reasons the court of appeals identified, venue is properly considered such a right. Because venue is not an element of the offense in the traditional sense and defendants often elect not to challenge it, "the government will not necessarily seek to prove the" grounds for venue "unless the defense warns the government that the matter is at issue." *United States* v. *Cordero*, 668 F.2d 32, 44 (1st Cir. 1981). Requiring contemporaneous objection is thus particularly appropriate in this context. The opposite rule, which would permit a defendant to raise venue for the first time on appeal and potentially to force a new trial because of a defect that could have been addressed easily in the district court, would result in gross inefficiencies and encourage gamesmanship. See Pet. App. 14 ("a defendant should not be permitted to hide in the weeds with an objection (especially on a waivable issue with a lower proof burden) only to pounce on appeal just in case things do not go as desired in the court below").

Those considerations have persuaded the large majority of courts of appeals to adopt the general rule reflected in the decision below. See *Cordero*, 668 F.2d at 44 (1st Cir. 1981) ("courts have consistently ruled that a claim of improper venue must be raised at least prior to a verdict"); *United States* v. *Potamitis*, 739 F.2d 784, 791 (2d Cir.) ("Objections to venue are waived unless 'specifically articulated' in defense counsel's motion for

acquittal"; "[a] general motion for a judgment of acquittal * * * is not sufficient to raise and preserve for appeal the question of venue"), cert. denied, 469 U.S. 918, and 469 U.S. 934 (1984);[2] *United States* v. *Pitt*, 193 F.3d 751, 762 (3d Cir. 1999) ("the issue of improper venue, at the very latest, must be raised in every possible scenario before the jury reaches its verdict"); *United States* v. *Stewart*, 256 F.3d 231, 238 (4th Cir.) ("If an objection to venue is not raised in the district court, the issue is waived on appeal."), cert. denied, 534 U.S. 1049 (2001), and 535 U.S. 977 (2002); *United States* v. *Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984) ("a defendant can waive venue rights by his silence–just by his failure to lodge an objection prior to trial"); *United States* v. *Sopczak*, 742 F.2d 1119, 1123 (8th Cir. 1984) (defendant "waived any challenge to venue by not raising the issue in the district court"); *United States* v. *Powell*, 498 F.2d 890, 891 (9th Cir.) ("venue may be waived," and "where, as here, the objection was not raised until after the jury had returned its verdict of guilty, we find that waiver did in

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[2] The Second Circuit has repeatedly embraced that rule. See *United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), cert. denied, 128 S. Ct. 1681 (2008); *United States* v. *Matera*, 489 F.3d 115, 124 (2d Cir. 2007), cert. denied, 128 S. Ct. 424, and 128 S. Ct. 925 (2007); *United States* v. *Bala*, 236 F.3d 87, 95-96 (2d Cir. 2000); *United States* v. *Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980); *United States* v. *Menendez*, 612 F.2d 51, 54- 55 (2d Cir. 1979). It has thus implicitly overruled its decisions in *United States* v. *Gross*, 276 F.2d 816 (2d Cir.), cert. denied, 363 U.S. 831 (1960), and *United States* v. *Brotherman*, 191 F.2d 70, 72-73 (2d Cir. 1951), which held that a defendant preserves a venue objection by making a general Rule 29 motion that does not specify any grounds for acquittal. See *United States* v. *Rivera*, 388 F.2d 545, 548 (2d Cir.) (describing *Gross* as indicating that a venue "objection is preserved by a general motion for acquittal after all the evidence has been received"), cert. denied, 392 U.S. 937 (1968).

fact occur"), cert. denied, 419 U.S. 866 (1974); *United States* v. *Greer*, 440 F.3d 1267, 1271 (11th Cir. 2006) (defendant must object to venue no later than close of evidence); *United States* v. *Gartmon*, 146 F.3d 1015, 1029 (D.C. Cir. 1998) (venue objection waived by failure to raise below).

b. Only one circuit has squarely adopted a contrary rule. In *United States* v. *Kelly*, 535 F.3d 1229 (2008), petition for cert. pending, No. 08-8328 (filed Dec. 2, 2008), a case petitioner does not cite, the Tenth Circuit held that where a possible defect in venue is not plain from the indictment, the defendant preserves his venue objection by making a non-specific motion for acquittal at the close of the evidence. The court reasoned that "[w]hen a defendant challenges in district court the sufficiency of the evidence on specific grounds, 'all grounds not specified in the motion are waived,'" *id.* at 1234 (quoting *United States* v. *Goode*, 483 F.3d 676, 681 (10th Cir. 2007), but when, in contrast, the defendant files "a general motion for acquittal that does not identify a specific point of attack, the defendant is deemed to be challenging the sufficiency of each essential element of the government's case, including venue," *id.* at 1234-1235. In a footnote, the court acknowledged "that some circuit authority could be construed as pointing in a different direction," but the court declined to conduct "a detailed analysis to determine whether these cases actually conflict with" its holding. *Id.* at 1235 n.2. Assuming that such a conflict existed, the court dismissed the contrary cases as "unpersuasive because they offer no explanation for why venue should be treated differently than any other offense element, the challenge to which would be preserved by a general motion for acquittal." *Ibid.* The court also noted that it was not aware "of a cogent

reason to apply such a differential treatment to the venue element of an offense on the issue of preservation." *Ibid.*

Petitioner cites *United States* v. *Zidell*, 323 F.3d 412, cert. denied, 540 U.S. 824 (2003), in which a panel of the Sixth Circuit considered on the merits (and rejected) a defendant's venue objection that was not specifically advanced during trial. The panel appeared to conclude, in line with the Tenth Circuit's later decision in *Kelly*, that "a general challenge to the Government's proofs in a Rule 29 motion for judgment of acquittal suffices to preserve the issue of venue, and * * * only a more specific Rule 29 motion operates to waive all grounds not specified." *Zidell*, 323 F.3d at 421.

c. These cases do not create a circuit disagreement worthy of this Court's review. To the extent *Zidell* conflicts with the decision below, it indicates confusion within the Sixth Circuit on the appropriate standard for finding waiver of a venue challenge. The panel in *Zidell* approached the question as one of first impression, stating that the Sixth Circuit had previously "indicated, albeit only in dicta," that a general motion for acquittal might suffice to preserve a venue objection. 323 F.3d at 421. The case it cited for that proposition, however, *United States* v. *Dandy*, 998 F.2d 1344, 1356-1357 (6th Cir. 1993), cert. denied, 510 U.S. 1163 (1994), did not address venue at all but rather concerned a general challenge to the sufficiency of the evidence. In fact, the Sixth Circuit on numerous occasions before *Zidell* has deemed venue objections waived where they were not raised at trial and in so doing has not drawn a distinction between general and specific motions for acquittal. See, *e.g.*, *United States* v. *English*, 925 F.2d 154, 158 (6th Cir.) (defendant "not allowed to challenge venue on ap-

peal because the issue was not raised in the court below"), cert. denied, 501 U.S. 1210, and 501 U.S. 1211 (1991); *United States* v. *Burkhart*, 501 F.2d 993, 996 (6th Cir. 1974) (venue waived where "[a]ppellant failed to object to venue until after the Government's case had been completed"), cert. denied, 420 U.S. 946 (1975); *United States* v. *McMaster*, 343 F.2d 176, 181 (6th Cir.) ("[No] objection having been made to venue prior to verdict, objection thereto was waived."), cert. denied, 382 U.S. 818 (1965); *Poliafico* v. *United States*, 237 F.2d 97, 113 (6th Cir. 1956) ("Objection to venue is waived by going to trial on the merits without raising the question."), cert. denied, 352 U.S. 1025 (1957); *Gowling* v. *United States*, 64 F.2d 796, 798 (6th Cir. 1933) ("[T]he question of venue was not raised until after conviction, and therefore came too late."). The *Zidell* panel did not acknowledge any of these cases or purport to overrule them.

Although *Kelly* directly conflicts with the Seventh Circuit's requirement that a defendant specifically raise venue at trial to preserve the issue for appeal, the Tenth Circuit stands virtually alone in its position.[3] The decision below is correct and consistent with the rule embraced by the large majority of the circuit courts. See pp. 8-10, *supra*. In addition, the situation implicating

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[3] The Tenth Circuit reasoned that its holding was consistent with "the weight of authority in other circuits," *Kelly*, 535 F.3d at 1234, but that is incorrect. The court's support for its assertion consisted primarily of citations to two decisions that are no longer valid, *id.* at 1235 (citing *Gross*, 276 F.2d at 818-819, see note 2, *supra*, and *United States* v. *Browne*, 225 F.2d 751, 755 (7th Cir. 1955)), from circuits that have squarely rejected the Tenth Circuit's position. As explained in text, see pp. 8-10, *supra*, the large majority of circuits agree with the rule the Seventh Circuit applied in this case.

the circuit conflict does not appear to arise with any significant frequency. That conflict is relevant only where a defendant moves for acquittal under Rule 29 without specifying any basis for relief and fails at any point during trial to object to a venue defect that becomes apparent during the government's presentation of evidence. The disagreement therefore does not currently require resolution by this Court. If the conflict deepens or if courts of appeals that currently adhere to the majority view reevaluate that position in light of the Tenth Circuit's decision in *Kelly*, this Court may review the issue at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
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Attorney

JANUARY 2009